

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF PUERTO RICO

3 In Re:) Docket No. 3:17-BK-3283 (LTS)

4)

5) PROMESA Title III

6 The Financial Oversight and)

7 Management Board for)

8 Puerto Rico,) (Jointly Administered)

9)

10 *as representative of*)

11)

12 The Commonwealth of)

13 Puerto Rico, *et al.*) December 9, 2020

14)

15 Debtors,)

16 In Re:) Docket No. 3:17-BK-4780 (LTS)

17)

18) PROMESA Title III

19 The Financial Oversight and)

20 Management Board for)

21 Puerto Rico,) (Jointly Administered)

22)

23 *as representative of*)

24)

25 Puerto Rico Power)

Authority,)

Debtor,)

OMNIBUS HEARING

BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN

UNITED STATES DISTRICT COURT JUDGE

AND THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN

UNITED STATES DISTRICT COURT JUDGE

1 APPEARANCES:

2 ALL PARTIES APPEARING TELEPHONICALLY

3 For The Commonwealth
4 of Puerto Rico, et al.: Mr. Martin J. Bienenstock, PHV
Mr. Brian S. Rosen, PHV
5 Mr. Steve Y. Ma, PHV

6 For Puerto Rico Fiscal
Agency and Financial
7 Advisory Authority: Mr. Luis C. Marini Biaggi, Esq.

8 For the Official
Committee of Unsecured
9 Creditors of all
Title III Debtors: Mr. Luc A. Despins, PHV

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11 For Cobra Acquisitions: Mr. Abid Qureshi, PHV
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23 Proceedings recorded by stenography. Transcript produced by
24 CAT.
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2	WITNESSES:	PAGE
3	None.	
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5	EXHIBITS:	
6	None.	
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1 San Juan, Puerto Rico

2 December 9, 2020

3 At or about 9:33 AM

4 * * *

5 THE COURT: Good morning. This is Judge Swain.

6 MS. NG: Good morning, Judge. It's Lisa. Everybody
7 is here.

8 THE COURT: Thank you.

9 Ms. Tacoronte, would you please call the case?

10 COURTROOM DEPUTY: Yes, Your Honor.

11 The United States District Court for the District of
12 Puerto Rico is now in session. The Honorable Laura Taylor
13 Swain presiding. Also present in court, the Honorable Judith
14 Dein. God save the United States of America and this
15 Honorable Court.

16 Bankruptcy Case No. 17-3283, *In re: The Financial*
17 *Oversight and Management Board for Puerto Rico as*
18 *representative of the Commonwealth of Puerto Rico, et al., for*
19 *Omnibus Hearing.*

20 THE COURT: Thank you.

21 Buenos dias. Good morning. Welcome, counsel,
22 parties in interest, and members of the public and press.
23 Today's telephonic Omnibus Hearing is occurring in what
24 continue to be challenging times for all stakeholders in these
25 Title III proceedings. We remain in the midst of the

1 worldwide COVID-19 pandemic, and our thoughts remain with
2 everyone affected on the island and on the mainland.

3 This is a year of severe challenges, as well as much
4 change. We continue to hope for progress, health, and safety
5 for all. As this year draws to a close, we also want to wish
6 everyone a joyous, socially distant holiday season, a happy
7 new year, and bright hopes for what 2021 will bring.

8 To keep today's telephonic hearing orderly, all
9 parties on the line must mute their phones when they are not
10 speaking. If you are accessing these proceedings on a
11 computer, you must select "mute" on both the Court Solutions
12 dashboard and your phone. When you wish to speak, you must
13 unmute on both the dashboard and the phone.

14 I remind everyone that consistent with court and
15 judicial conference policies, and the orders that have been
16 issued, no recording or retransmission of the hearing is
17 permitted by any person, including but not limited to the
18 parties, members of the public, or the press. Violations of
19 this rule may be punished with sanctions.

20 I will call on each speaker during the hearing. When
21 I do, please identify yourself by name for clarity of the
22 record. After the speakers listed on the Agenda for each of
23 today's matters have spoken, I may allow other parties in
24 interest to briefly address any issues raised during the
25 presentations that require further comment. If you wish to be

1 heard in this manner, please state your name clearly at the
2 appropriate time. Don't just use the wave function on the
3 Court Solutions dashboard. I will call on the speakers if
4 more than one person wishes to be heard.

5 Please don't interrupt each other or me during the
6 hearing. Interruptions make it difficult to create an
7 accurate transcript. But, as always, I apologize in advance
8 for breaking this rule, as I may interrupt when I have
9 questions or if you go beyond your allotted time. If anyone
10 has difficulty hearing me or another participant, please say
11 something right away.

12 The Amended Agenda, which was filed at Docket Entry
13 No. 15376 in Case No. 17-3283, is available to the public at
14 no cost on Prime Clerk for those interested. I encourage each
15 speaker to keep track of his or her own time. The Court will
16 also be keeping track of the time and will alert each speaker
17 when there are two minutes remaining with one buzz, and when
18 time is up, with two buzzes.

19 Here is an example of the buzz sound.

20 (Sound played.)

21 THE COURT: If your allocation is two minutes or
22 less, you will just hear the final two buzzes.

23 If we need to take a break, I'll direct everyone to
24 disconnect and dial back in at a specified time. Our timing
25 this morning is from 9:30 AM to 1:00 PM Atlantic Standard

1 Time. Of course in Eastern Standard Time, it's about 8:39
2 now, so it's 8:30 to noon Eastern Time.

3 The first Agenda item is, as usual, status reports
4 from the Oversight Board and AAFAF. As I requested in the
5 Procedures Order, these reports have been made in writing in
6 advance of this telephonic hearing and are available on the
7 public docket at Docket Entry Nos. 15382 and 15388 in Case No.
8 17-3283.

9 In addition, PREPA and the Oversight Board have
10 submitted a status report available on the public docket at
11 Docket Entry No. 15308 in Case No. 17-3283, and at Docket
12 Entry No. 2314 in Case No. 17-4780, regarding criminal and
13 administrative proceedings that those government parties
14 contend are material to the resolution of Cobra's
15 administrative expense claim.

16 Our first Agenda item is the status reports. I thank
17 the Oversight Board and AAFAF for the care and detail
18 reflected in their reports, which I find quite comprehensive.
19 I have a question for the Oversight Board's counsel regarding
20 the claims resolution process, but first I will invite the
21 Oversight Board's counsel to make any general or additional
22 remarks.

23 MR. BIENENSTOCK: Good morning, Judge Swain. This is
24 Martin Bienenstock of Proskauer for the Oversight Board.

25 The only additional remark, because it occurred after

1 we filed the status report, is something that I think everyone
2 knows, but just to put it on the record, yesterday President
3 Trump made three additional appointments to the Oversight
4 Board. So currently we have five members. We are already in
5 discussions with the mediators as to how this might affect
6 timing of the ongoing sessions and decision-making process,
7 but it is progress.

8 Other than that, I only wanted to, as the Court did,
9 wish the Court, its staff, all creditors and parties in
10 interest, you know, health, happiness over the new year, and
11 we have high hopes for 2021. Other than that, unless the
12 Court -- I guess the Court's question about the claims
13 process, et cetera, my partner, Brian Rosen, is probably best
14 to respond to it.

15 THE COURT: Thank you, Mr. Bienenstock.

16 Mr. Rosen, are you there? Please unmute on both the
17 dashboard and your phone.

18 MR. ROSEN: Your Honor, this is Brian Rosen.

19 THE COURT: Good morning, Mr. Rosen.

20 One question on the ADR. So, according to the
21 report, there have been 222 cases -- or claims designated to
22 that process so far. Do you expect to make additional
23 designations before the end of the year?

24 MR. ROSEN: Your Honor, there is -- I'm just making
25 sure I get this right, and I apologize for that. Our next

1 notice, Your Honor, I believe is -- well, we sent offers out
2 on December 7th. I'm not sure that we will be making any
3 additional ones this year based upon our analysis so far, Your
4 Honor.

5 We are expecting, however, in the interim, to be
6 responding to letters and them -- and getting responses to us
7 in the next few weeks. So that will tell us actually, Your
8 Honor, how many will -- that we've already submitted into the
9 ADR process, will ultimately move to the next level of that
10 ADR. But right now, no --

11 THE COURT: Thank you.

12 MR. ROSEN: -- to -- the initial answer to your
13 question.

14 THE COURT: Thank you. Yes, that's helpful for our
15 planning purposes. And good to hear your voice.

16 MR. ROSEN: Same here, Your Honor. Happy holidays.

17 THE COURT: Thank you. To you as well.

18 So I will turn now to AAFAF. Mr. Marini, do you have
19 any general or further remarks?

20 MR. MARINI BIAGGI: Good morning, Your Honor. Luis
21 Marini of Marini Pietrantonio Muniz for AAFAF.

22 Good morning, Your Honor. I don't have anything else
23 to add, unless the Court has any questions.

24 THE COURT: No, I don't have any further questions.
25 Good to hear your voice as well. Hello, Mr. Marini, and thank

1 you.

2 MR. MARINI BIAGGI: Likewise, Your Honor.

3 THE COURT: And so we will now turn to remarks
4 concerning the PREPA report on the Cobra administrative
5 expense claim. I understand that Cobra's counsel,
6 Mr. Qureshi, wishes to make a comment, and we've allocated two
7 minutes for Mr. Qureshi.

8 MR. QURESHI: Thank you. Good morning, Your Honor.
9 For the record, Abid Qureshi, Akin, Gump, Strauss, Hauer &
10 Feld, on behalf of Cobra.

11 Your Honor, I will be very brief and start with just
12 underscoring the lack of progress and really fundamental
13 unfairness as it relates to Cobra, leaving us without
14 effective redress for 216 million dollars of post-petition
15 work that was completed way back in March of 2019.

16 As Your Honor will see from the status report that
17 PREPA has filed, Cobra is not a defendant in the criminal
18 matter, and we have previously briefed why we do not believe
19 that the outcome of that criminal proceeding will have or
20 could have any meaningful effect on our application for
21 administrative expenses.

22 When Your Honor originally stayed this matter back in
23 October of 2019, at the time, the criminal trial was scheduled
24 to proceed on December the 9th of 2019. So here we are, to
25 the day, a year later from when that criminal trial was

1 expected to proceed, and we still do not have a trial date.

2 Your Honor, with respect to the ongoing FEMA review,
3 I just wish to remind the Court that the August 2020
4 completion date for that review has now come and gone, with,
5 once again, no deadline or real insight into when that will be
6 completed. But, Your Honor, this is FEMA's third review for
7 reasonableness. Both the first review by FEMA and the second
8 review by Rand found that Cobra's rates were reasonable.

9 What FEMA does ultimately conclude, however, will not
10 affect PREPA's liability for the expenses that have been
11 incurred, nor the reasonableness of those expenses. That is
12 governed by the contract between Cobra and PREPA. As the --
13 as PREPA notes in the status report, Your Honor, they needed
14 Cobra's assistance to respond to the most recent request by
15 FEMA. And Cobra is cooperating.

16 (Sound played.)

17 MR. QURESHI: Yet at every turn, Your Honor, PREPA
18 seeks to delay.

19 So in conclusion, Your Honor, we continue to believe
20 that the imposition of the stay is fundamentally unfair. We
21 anticipate returning to this Court in January, once again to
22 seek the stay to be lifted, so that we can proceed with our
23 application and our motion for administrative expenses.

24 Thank you, Your Honor. I'm happy to take any
25 questions.

1 THE COURT: I think you've been quite direct and
2 comprehensive in your remarks. And given the -- well,
3 actually, I will first hear -- I think that Ms. Waxman wishes
4 to respond, and so I will turn to Ms. Waxman in the first
5 instance. Thank you, Mr. Qureshi.

6 Ms. Waxman.

7 MS. WAXMAN: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MS. WAXMAN: Hadassa Waxman for the Oversight Board
10 and government parties.

11 Your Honor, as we set forth in our papers, the Board
12 and the government parties' position remains unchanged as to
13 the stay. Given the pendency of the criminal proceedings, the
14 stay should remain in place.

15 As we've set forth in our papers, a finding of Cobra
16 -- that Cobra CEO acted fraudulently with respect to the
17 contracts with FEMA and PREPA may invalidate some or all of
18 PREPA's obligations under the terms of the contracts at issue.
19 So a resolution of the criminal case is really a gating
20 question as to the resolution of Cobra's claims.

21 Second, Your Honor, discovery will be necessary in
22 this case, and that will be severely impacted, unless the
23 criminal case is resolved. As Your Honor can imagine, there
24 will be depositions and documents that will need to be
25 produced, and potential witnesses could very well assert Fifth

1 Amendment rights. So discovery in this case will not be
2 meaningful.

3 For those reasons, again, Your Honor, it's the
4 Board's position and the government parties' position that the
5 stay should remain in place. Thank you, Your Honor.

6 THE COURT: Thank you, Ms. Waxman.

7 In view of the statement by Ms. Waxman, and taking
8 into account our prior discussions, and the Court's
9 consideration of the prior applications, and the Court's
10 rulings in that regard over the past year, the Court will
11 require a further status report from the Oversight Board and
12 PREPA on June 6th of 2021.

13 And while I cannot stop you from queuing up the
14 motion again for January, it is my intention to await the June
15 report, unless something happens with respect to the trial or
16 FEMA, and there remains the structure of PROMESA as to the
17 treatment of administrative claims. And so for that bundle of
18 reasons, I think it is most efficient and appropriate,
19 although understandably painful to Cobra and frustrating to
20 Cobra, that we await events in the first half of the year and
21 a status report by June 6th, 2021, from the government
22 parties.

23 Thank you both, Mr. Qureshi and Ms. Waxman.

24 Let's see. Is there anyone who wished to make any
25 further comments or who has questions regarding the status

1 reports? I will wait 30 seconds for any such person to speak
2 their name, and then I will call on the people who've
3 identified themselves, if any.

4 So if you want to be heard, unmute on the dashboard
5 and your phone, and state your name.

6 (No response.)

7 THE COURT: Thank you.

8 We'll now go on to the contested matters. The first
9 contested matter, which is Item II.1 on the Agenda, is the
10 Commonwealth's Motion for Approval of the Assumption of
11 Settlement Agreements with the Garcia-Rubiera Class
12 Plaintiffs, Docket Entry No. 15171 in Case No. 17-3283.

13 We have a total of 20 minutes allocated for argument.
14 And speaking first on behalf of the Commonwealth will be
15 Mr. Ma.

16 Mr. Ma.

17 MR. MA: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. MA: For the record, Steve Ma of Proskauer Rose
20 for the Oversight Board, as representative of the
21 Commonwealth, as the Title III debtor.

22 The relief we seek is an order approving assumption
23 of two pre-petition settlement agreements. And in the
24 alternative, we seek an order simply approving the
25 Commonwealth's payment of claims under its settlement

1 | agreements. And the Oversight Board consents to the entry of
2 | such order under PROMESA Section 305.

3 | The entire reason for the assumption motion is that
4 | the debtor and the *Gracia-Gracia* plaintiffs entered into a
5 | stipulation to resolve the Lift Stay Motion filed by
6 | plaintiffs. And as far as that stipulation, the plaintiffs
7 | wanted some order to rely on that would provide the
8 | Commonwealth -- that the Commonwealth would carry out the
9 | settlement agreements. And it seems appropriate to assume the
10 | settlement agreements in this instance, but if the Court
11 | determines that the settlement agreements are not executory,
12 | the parties are satisfied with lesser relief simply confirming
13 | that the Commonwealth may make the payments pursuant to the
14 | settlement agreement.

15 | And the Commonwealth has requested this alternative
16 | relief seeking such other and further relief, as the Court may
17 | deem appropriate, in its assumption motion. And we've
18 | confirmed with the plaintiffs' counsel that such an
19 | alternative relief is satisfactory.

20 | THE COURT: And what would be --

21 | MR. MA: However --

22 | THE COURT: -- the particular legal foundation for my
23 | issuing a general order stating that you can do -- you can
24 | make a payment that PROMESA apparently allows you to do,
25 | whether I approve of it or not?

1 MR. MA: I think, Your Honor, the Court can do so
2 under -- as -- its own under Rule 9019, and pursuant to its
3 general authority, under, oh, 105. Alternatively, the Court
4 could simply authorize lifting of the automatic stay for those
5 payments to be made.

6 THE COURT: Thank you. You can go on.

7 MR. MA: Sure.

8 So the Oversight Board -- I believe that the
9 settlement agreements, nonetheless, are executory contracts.
10 And I'd like to begin with the issue the Court directed the
11 parties to address, and that is the application of the
12 Countryman test versus the functional approach.

13 The Oversight Board has not been able to find any
14 binding authority requiring the Court to apply the Countryman
15 test, and argues that this Court may and should, in this
16 instance, apply the functional approach. In particular, the
17 U.S. Supreme Court in *NLRB v. Bildisco & Bildisco* -- the
18 citation for that is 465 U.S. 513 (1984). The Supreme Court
19 noted in that case that an executory contract is, "one which
20 performance remains due to some extent on both sides." And of
21 significance is that the Supreme Court did not mention
22 materiality, but rather, quote, to some extent.

23 Furthermore, the legislative history shows that
24 Congress intended a flexible approach in applying Section 365.
25 Senate Report No. 95-989 notes that, while there isn't a

1 precise definition of executory contract, quote, it generally
2 includes contracts on which performance remains due to some
3 extent on both sides. So I note that the use of "generally
4 includes" suggests that contracts with outstanding obligations
5 on both sides do not comprise the entire universe of executory
6 contracts.

7 And the First Circuit seems to have endorsed the
8 application of either the Countryman or functional approach in
9 *In re: La Electronica, Inc.*, 995 F.2d 320 (1st Cir. 1993).

10 Similarly, the District Court for the District of
11 Massachusetts also explained that, quote, courts in this
12 circuit apply both tests, often in tandem, and the First
13 Circuit has endorsed this approach. And that case was *Stevens*
14 *v. CSA, Inc.*, 271 B.R. 410 (D. Mass. 2001).

15 Similarly, the Bankruptcy Court in the District of
16 Puerto Rico noted the same in *In re: Redondo Construction*
17 *Corp.*, 2019, Bankruptcy -- Lexus 1162, Bankruptcy Court for
18 the District of Puerto Rico, April 8th, 2019.

19 So my point is that the First Circuit does not
20 require application of the Countryman test. And, in fact, the
21 Supreme Court and Congress have indicated that Section 365
22 permits a flexible approach to determining what is an
23 executory contract.

24 So here it is appropriate for the Court to apply the
25 Countryman approach to determine --

1 (Sound played.)

2 MR. MA: -- whether the settlement agreements are
3 executory contracts. Under the functional approach, the Court
4 works backwards, proceeding from an examination of the goals
5 of -- assumption or rejection is expected to accomplish. And
6 in the 11th Circuit, which has adopted both the Countryman
7 test and functional approach, courts apply the functional
8 approach where assumption or rejection of a contract would
9 benefit the estate.

10 And that case was *In re: General Development Corp.*,
11 84 F.3d 1364 (11th Cir. 1996).

12 Similarly, the Sixth Circuit has done so in *In re:*
13 *Jolly*, 574 F.2d 349 (6th Cir. 1978).

14 Notably here, applying the functional approach rather
15 than the Countryman test is appropriate because analysis of
16 material outstanding obligation under those Countryman tests
17 adds nothing to the case and doesn't affect the outcome. If
18 the settlement agreements are assumed, plaintiffs are paid in
19 full. However, if the settlement agreements are not
20 executory, but plaintiffs prevail under the stay motion, they
21 are again paid in full. While if the Commonwealth prevails
22 under the stay motion, the plaintiffs are again paid in full
23 under a plan of adjustment.

24 And this result is one of the criticisms of the
25 Countryman test that the Bankruptcy Court for the Southern

1 District of New York explained in *Cohen v. Drexel Burnham*
2 *Lambert Group*, 138 B.R. 687 (Bankr. S.D.N.Y. 1992).

3 So here the settlement agreements are executory
4 contracts under a functional approach, and there's a long
5 history of litigation that assumption of the settlement
6 agreements would resolve. Assumption would also provide
7 finality with respect to the issues of plaintiffs' property
8 interest in the insurance fund held by the Commonwealth, which
9 the First Circuit had ordered in its 2013 decision that the
10 funds would not escheat --

11 (Sound played.)

12 MR. MA: -- until the Commonwealth had satisfied
13 conditions under the --

14 COURT REPORTER: Counsel, can you -- Your Honor, this
15 is the court reporter. Can counsel please repeat his last
16 sentence? The buzzer sounded while he was speaking.

17 THE COURT: Thank you.

18 Mr. Ma, would you repeat your last sentence --

19 MR. MA: Yes.

20 THE COURT: -- and wind up, because your time has run
21 out.

22 MR. MA: Yes. Assumption would provide finality with
23 respect to the issues of plaintiffs' property interest in the
24 insurance fund held by the Commonwealth, noting that the First
25 Circuit had ordered in its 2013 decision that no funds would

1 escheat until the Commonwealth had satisfied its obligations
2 under the Due Process Clause.

3 And I'll end there, Your Honor.

4 THE COURT: Thank you very much, Mr. Ma.

5 And now we have Mr. Despins for ten minutes.

6 Mr. Despins, are you there?

7 MR. DESPINS: Yes. Good morning, Your Honor. I
8 apologize.

9 THE COURT: Good morning.

10 MR. DESPINS: So, briefly, Your Honor, I just want to
11 address one point that was made at the outset about the fact
12 that the motion sought alternative relief to pay the funds
13 other than through an assumption of the settlement agreement.
14 We didn't see that. So I think we -- I don't see the basis
15 for that. But, in any event, that would be an advisory
16 opinion.

17 If it's a 9019 settlement, you know, what's the
18 settlement? They're getting paid in full. So if there's
19 uncertainty about whether they have trust funds or not, that's
20 not a settlement. They're just granting the relief. So it
21 could not be approved under 9019.

22 But let me address the crux of the issue first, to
23 say that we understand, Your Honor, this is a horrible
24 situation. The underlying facts are horrible in terms of
25 people being deprived of, you know, payment on their claims.

1 But, you know, there are hundreds, thousands of other people
2 that have equally horrible facts, and they are being offered
3 less than one percent recovery. There are hundreds of
4 millions of people with judgments, settlements, and similar
5 claims that are projected, according to the Oversight Board,
6 to get less than one percent.

7 It's also important, Your Honor, to understand the
8 litigation has been settled. They -- under Puerto Rico law,
9 they cannot go back and say, oh, I didn't get paid, therefore,
10 I'm going to relitigate the underlying claim. The only thing
11 they can do is pursue the payment of the settled amount. And
12 that's key here. They have no ability to walk --

13 THE COURT: But Mr. Despina --

14 MR. DESPINA: Yes, Your Honor.

15 THE COURT: -- they do still have the ability to
16 press the trust theory or an ownership theory. In your
17 papers, you assert that it's clear they have nothing but an
18 unsecured claim, but the First Circuit remanded specifically
19 for a tracing exercise, or a 362(d)(2) motion asserting that
20 the Commonwealth has no equity in these funds. And that
21 controversy is clearly material to the premise of the argument
22 that you are making that these are merely unsecured claims,
23 like other unsecured claims.

24 So the Puerto Rico law principle that you've
25 articulated, of a judgment being merely a right to collect on

1 an unsecured claim, does not seem to be consistent with the
2 law of the case here.

3 MR. DESPINS: Well, I was talking about the
4 underlying claims. Now we're talking the treatment of the
5 claim. And it's true that the First Circuit remanded to Your
6 Honor for that determination. However -- and that's the crux
7 of the argument here. The Board has always taken the position
8 that they have no such trust fund claim. And I'll stipulate
9 that there's uncertainty on that issue, but what they're doing
10 is actually conceding the point.

11 This is another one -- it's like the GO priority
12 issue. They're just conceding the point. Therefore, it's not
13 a settlement. There's no benefit to the estate to assume a
14 contract based on the risk when they're actually paying in
15 full. So the risk argument does not -- does not really work
16 here.

17 And in terms of the First Circuit and the functional
18 approach, I'll concede at first blush, because Your Honor
19 asked us to submit supplemental papers on this, that the First
20 Circuit has not issued a decision saying, thou shall not use
21 the functional approach. Okay. But we hear that. However,
22 in the cases in the First Circuit, like the *Gallivan* case that
23 is cited, cited with approval; the *Columbia Gas* case, which
24 the debtors don't address at all, which is on all fours with
25 this claim -- with this case in terms of the analysis of

1 executory or not.

2 The point here, as I said, is that there's payment in
3 full. And, therefore, there cannot be a risk that's being
4 settled. Even if you look, Your Honor, at the cases, assuming
5 for a second that a functional approach could be used by the
6 Court, if you look at the cases that apply the functional
7 approach, such as *WorldCom*, at page 497, in that case, Judge
8 Gonzalez distinguished this type of case with the case he was
9 dealing with based on what could happen in the *WorldCom* case,
10 which makes -- so what that tells you is that just saying that
11 the functional approach works does not resolve the issue.

12 Just to give you an example, there's a case,
13 Bankruptcy Court decision, *Structurlite Plastics*, 86 B.R. 922,
14 where in that case there was a medical claims trust fund. The
15 debtor moved to assume that, and the Court said, no, you can't
16 assume that. First of all, it's not executory. But even if
17 the functional approach did apply, and you're telling me that
18 this is very important to maintain employee morale, et cetera,
19 et cetera, and that there could be a strike if the medical
20 claims are not paid in full, that does not satisfy even the
21 functional approach, because of the detriment to the other
22 creditors.

23 So the point is, even on the functional approach, the
24 Court is looking at -- or the Court should look at the impact
25 on other creditors who are getting pennies on the dollar. In

1 | our case, less than a penny.

2 | And we believe, by the way, that our submissions on
3 | December 16th, Your Honor, with your permission, should not
4 | only address what the First Circuit has said in -- cases
5 | in the First Circuit have said about the functional approach,
6 | but also what is the -- if the functional approach applies,
7 | what result does that bring. And that, Your Honor, we submit
8 | would show that, even in the functional approach, that the
9 | Court should not approve this motion.

10 | THE COURT: But let me just respond to you --

11 | MR. DESPINS: Yes, Your Honor.

12 | THE COURT: -- and state generally that the
13 | submissions, to the extent either side is arguing for or
14 | against the functional approach, or any other different
15 | approach, should include the positions as to the result of
16 | application of the alternative approach.

17 | MR. DESPINS: Thank you, Your Honor. And also, I
18 | would end by saying that we strongly dispute that all outcomes
19 | lead to payment in full. There -- it may be that if a plan is
20 | confirmed that has a convenience class that is high enough to
21 | pay the individual folks, they will get paid in full. And by
22 | the way, we wouldn't oppose that. But also, their counsel
23 | fees would be way above the convenience class, and, therefore,
24 | not all roads lead to payment in full. So that's --

25 | THE COURT: Well, the settlement -- I'm sorry.

1 Mr. Despins.

2 MR. DESPINS: Yes, Your Honor.

3 THE COURT: The settlement is structured to treat the
4 payments to counsel as holdbacks from the -- an accumulation
5 of holdbacks from the amounts paid to the particular
6 claimholders. And so if the particular claimholder is payable
7 a hundred percent in the gross amount under the convenience
8 class, then why would there be a separate convenience class
9 filter for that accumulated amount that's being paid or
10 advanced to counsel?

11 MR. DESPINS: Your Honor, I have to admit that I need
12 to look at that feature --

13 (Sound played.)

14 MR. DESPINS: -- because I don't -- okay. I'm not
15 sure that counsel will not be paid directly their claims under
16 a plan. So -- and they actually get, under the settlement,
17 hundreds of thousands of dollars in advances. So I don't
18 think that would qualify under the convenience class. It may
19 be that they described it as such, but I don't think that's
20 the way it actually plays out in terms of the actual payments,
21 Your Honor.

22 THE COURT: Thank you.

23 MR. DESPINS: Thank you, Your Honor.

24 THE COURT: Thank you, Mr. Despins.

25 Mr. Ma, you've allotted three minutes for rebuttal.

1 MR. MA: This is again addressing -- I'd first like
2 to address the point on alternative relief, which the
3 Oversight Board had requested in its motion on page 11
4 seeking, such other and further relief as the Court may deem
5 proper. On the point about the advisory ruling, approval of
6 the payments are not an advisory ruling in the alternative
7 order. It's approval of the settlement of the stay litigation
8 pending in this Title III court.

9 On the point about the property interest, even if the
10 Board is conceding that, the property interest issue, there is
11 no purpose served by litigating the issue with plaintiffs
12 since they would be paid in full as a convenience class claim.
13 And these are all small claims. The vehicle reimbursements
14 are either 99 dollars or 148 dollars per vehicle, per year.
15 So these would likely fall under any threshold as a
16 convenience class claim.

17 (Sound played.)

18 MR. MA: And at the core, these -- the plaintiffs'
19 claims are not the same as the claims represented by the
20 Unsecured Creditors Committee, because the plaintiffs are
21 asserting trust interests in the funds held. And notably, the
22 Commonwealth has segregated funds for accounting purposes, as
23 we've noted in prior -- our prior papers on the Lift Stay
24 Motion, so resolving the issues regarding the property
25 interest by assuming the settlement agreements would allow the

1 release of these funds so that the Commonwealth can use them.

2 And, furthermore, there is no detriment to other
3 creditors, because the plaintiffs would get the same treat --
4 all the same treatment as convenience class claims. And on
5 the counsels' claims, as the Court noted, these are paid out
6 of a 20 percent holdback of all the claims paid, which is a
7 feature in the Commonwealth Court settlement agreement. And
8 we view this as merely an allocation of proceeds, not a
9 separate claim of plaintiffs' counsel. It's all in there,
10 Your Honor.

11 THE COURT: Thank you, Mr. Ma, and thank you,
12 Mr. Despins. I will reserve decision pending the supplemental
13 submissions next week, and I thank you for being responsive to
14 my questions here. This was very helpful to me.

15 The final Agenda item is the motion for relief from
16 stay of -- I'm sorry. I am just fiddling around with my
17 papers here and seem to have lost track of one paper, but I'm
18 sure that I will find it in a moment.

19 Anyway, the second contested matter is Mr. Luis
20 Duprey-Rivera's Motion for Relief from the Automatic Stay, for
21 which we have allocated a total of ten minutes of argument:
22 Three minutes for the movant, five minutes for response by
23 AAFAF, and then a two-minute rebuttal for the movant.

24 This is Docket Entry No. 15186 in Case No. 17-3283.
25 So I would invite Mr. Luis Rodriguez Munoz to begin as counsel

1 for the movant. You'll need to unmute both your phone and the
2 computer interface.

3 Ms. Ng, is Mr. Rodriguez Munoz on the line?

4 MS. NG: Judge, hold on.

5 No. I don't see him on the line.

6 THE COURT: Is Mr. Marini on the line?

7 MR. MARINI BIAGGI: Good morning, Your Honor. Luis
8 Marini. I am on the line, Your Honor.

9 THE COURT: Good morning. Have you had any
10 communication with Mr. Rodriguez Munoz?

11 MR. MARINI BIAGGI: Yes, Your Honor. We sent to
12 Mr. Rodriguez the order to register in Court Solutions last
13 week. And I understand he called my office. My assistant
14 just gave me a message about five minutes ago that he may be
15 having trouble connecting. I did not speak with him, but I
16 did get that message a few minutes ago.

17 THE COURT: Did your office try to help him with
18 connecting instructions? I'm just wondering whether we should
19 be waiting.

20 MR. MARINI BIAGGI: Yes, we did. We sent him the
21 instructions last week and directed him again today. I don't
22 know if he's going to connect, Your Honor. He just left that
23 message that he was having trouble.

24 THE COURT: Alright. And how long ago was that?

25 MR. MARINI BIAGGI: Maybe five or ten minutes ago.

1 THE COURT: Are you in a position to ask whoever in
2 your office was in communication with him to reach out to him
3 again and ask whether he does wish to connect and make his
4 argument?

5 MR. MARINI BIAGGI: Yes. I'll check right now his
6 number, and I'll do that.

7 THE COURT: Thank you. And we'll all just wait.

8 MR. MARINI BIAGGI: Good morning, Your Honor. Luis
9 Marini. Your Honor, I -- can you hear me okay?

10 THE COURT: Yes, I can. Thank you.

11 MR. MARINI BIAGGI: Your Honor, I've reached counsel
12 for movant directly just now and was able to speak with him.
13 He did register. He's having trouble logging in. He asked me
14 to request whether this can be moved to the January Omnibus.

15 We don't have any objection. So I'll leave it up to
16 you, Your Honor.

17 THE COURT: Very well. The adjournment request is
18 granted. And that adjournment request is understood as and
19 deemed to be a waiver of the 362(e) time limit for
20 determinations of the Motion for Relief from the Automatic
21 Stay. So we will put this on the Agenda for the January Omni.

22 And thank you, Mr. Marini, for reaching out and
23 speaking with Mr. Rodriguez.

24 MR. MARINI BIAGGI: Sure, Your Honor. Thank you.

25 THE COURT: And so this concludes the set Agenda for

1 | this Omnibus Hearing. Is there anyone who believes that
2 | another matter should be addressed today? I will again wait
3 | 30 seconds for anyone to state their name if they wish to be
4 | heard before we adjourn.

5 | (No response.)

6 | THE COURT: The 30 seconds are up.

7 | The next scheduled hearing is on January 12th, 2020.
8 | That hearing will begin at 9:30 AM Atlantic Standard Time, and
9 | it will occur telephonically as well. The Court will issue a
10 | procedures order providing appropriate logistical details.

11 | As always, I thank the court staff in Puerto Rico,
12 | Boston and New York for their work in preparing for and
13 | conducting today's hearing, and for their outstanding ongoing
14 | support of the administration of these cases, especially in
15 | these challenging times.

16 | Stay safe, keep well, and good holidays, everyone.
17 | We are adjourned.

18 | (At 10:19 AM, proceedings concluded.)

19 | * * *

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1 U.S. DISTRICT COURT)
2 DISTRICT OF PUERTO RICO)

3

4 I certify that this transcript consisting of 31 pages is
5 a true and accurate transcription to the best of my ability of
6 the proceedings in this case before the Honorable United
7 States District Court Judge Laura Taylor Swain, and the
8 Honorable United States Magistrate Judge Judith Gail Dein on
9 December 9, 2020.

10

11

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13 S/ Amy Walker

14 Amy Walker, CSR 3799

15 Official Court Reporter

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